In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 697

GENERAL ARMATURE AND MANUFACTURING CO.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 254-259) is reported at 192 F. 2d 316. The decision and order of the National Labor Relations Board (R. 211a-225a) are reported at 89 NLRB 654.

JURISDICTION

The decree of the court below was entered on December 10, 1951 (R. 260-262) and thereafter modified in respects not relevant to any issue presented here on January 11, 1952 (R. 267-269). The petition for a writ of certiorari was filed on

April 10, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Petitioner obtained a subpena directing a field examiner of the National Labor Relations Board to testify in a Board proceeding concerning matters which came to his knowledge in his official capacity. The field examiner refused to testify, on the ground that permission to testify concerning such matters had not been granted by the Board or the General Counsel, as required by the Board's rules and regulations. The trial examiner, under these circumstances, did not direct the field examiner to testify. The question presented is whether petitioner, having failed to seek permission from the Board or the General Counsel to adduce the field examiner's testimony, and having failed to afford the field examiner adequate opportunity to obtain permission, was deprived of due process by the trial examiner's ruling.[1]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C.,

---

[1] Questions (1) and (3) urged by petitioner (Pet. 5) are not properly presented in this case, since petitioner did not challenge below the validity of Board Rule 203.90, pursuant to which prior authorization is required (see pp. 8-10. *infra*).

Supp. IV, 151 *et seq.*), and of the Board's Rules and Regulations appear in the Appendix to the Petition, pp. 25-28.

STATEMENT

Following the usual proceedings under the Act the court below approved the Board's findings that petitioner had violated Section 8 (a) (5) and (1) of the Act by refusing to bargain collectively with the International Brotherhood of Electrical Workers, AFL, hereinafter called the Union, which had been certified by the Board as the collective bargaining representative of petitioner's employees in an appropriate unit, and enforced the Board's order requiring petitioner to bargain with the Union (R. 255-259). Petitioner challenges the decision below insofar as it upheld the Board's subsidiary finding that petitioner was not denied a fair and full opportunity to present its case by reason of the trial examiner's refusal to direct a Board field examiner to testify with respect to certain matters relating to the instant case which had come to his knowledge in his official capacity except, as required by the Board's Rules and Regulations, upon the written consent of the Board or its Chairman or its General Counsel.

A. The Proceedings Before the Board

On September 8, 1948 petitioner and the Union entered into an agreement which provided that an election be conducted under the direction and

supervision of the Board's Regional Director for the Sixth Region among petitioner's employees in a unit agreed upon as appropriate to determine the Union's representative status (R. 176a; 16a-21a, 146a). The agreement provided, *inter alia,* for the timely filing of objections with the Regional Director to the conduct of the election or to conduct affecting the results of the election (R. 176a; 18a-19a). It further provided that the Regional Director investigate such objections and issue a report thereon and that "the determination of the Regional Director shall be final and binding upon any question * * * raised by any party hereto relating in any manner to the election" (R. 176a-177a; 17a).

The Union won the election which was held on September 16, 1948 (R. 177a; 22a-23a). Thereafter, petitioner by timely objections challenged the election on the ground that the Union had engaged in misconduct allegedly affecting the results thereof (R. 177a; 24a-25a). The Regional Director thereupon directed one of the field examiners under his supervision, Murray Geller, to investigate petitioner's objections to the results of the election (R. 178a; 152a). Geller proceeded to make such an investigation (R. 178a, 183a-190a, 213a-216a; 43a-44a, 47a-49a, 98a, 103a-104a, 106a, 117a, 127a-128a, 152a-157a, 164a-166a, 169a-170a). Thereafter the Regional Director issued his report upon the objections in which he found, on the basis

of the investigation made by Geller, that petitioner's objections raised no substantial or material issue with respect to the election and overruled them (R. 213a; 26a-30a). The Regional Director accordingly certified the Union on November 18, 1948 as the bargaining representative of petitioner's employees (R. 178a; 30a).

Thereafter, the Union requested petitioner to bargain collectively but petitioner refused to do so for the reason that it considered the certification "as contrary to law and of no force and effect" (R. 219a-220a; 40a-41a, 45a-46a, 58a, 60a, 61a).

Following petitioner's refusal to bargain, the Union initiated unfair labor practice proceedings against petitioner under Section 10 of the Act (R. 172a; 8a-10a). At the hearing before the trial examiner petitioner sought to establish by testimony from various witnesses that the Regional Director's investigation of its objections to the results of the election had been so inadequate and incomplete as to render his overruling of petitioner's objections and issuance of the certification of the Union arbitrary and capricious (R. 180a-181a, 184a, 214a). On the first day of the hearing, July 6, 1949, petitioner requested the trial attorney representing the General Counsel of the Board at the hearing to permit Geller, who was present, to testify (R. 236a). When the trial attorney declined, stating that he was not

"authorized to give that permission," petitioner requested the trial examiner to issue a subpena directing Geller to appear to testify on the following day and the examiner did so (R. 236a).[2] Geller appeared at the hearing on the following day, July 7, in response to the subpena (R. 184a, 213a; 108a-110a). After he was called and sworn as a witness, Geller declined to testify with respect to his investigation of petitioner's objections to the results of the election because he had not been authorized to testify with respect to such matters as required by Rule 203.90 of the Board's Rules and Regulations (R. 184a, 213a; 109a). In relevant part, Rule 203.90 provides that "no * * * field examiner * * * shall * * * testify in behalf of any party to any cause * * * with respect to any information, facts, or other matter coming to his knowledge in his official capacity * * * without the written consent of the Board or the Chairman of the Board * * * or the general counsel * * * ."[3]

---

[2] Section 11 of the Act provides that "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses * * *." The Board's Rules and Regulations (Series 5, as amended August 18, 1948, Sec. 203.31(a) and 203.35(b)) direct that applications for subpenas made during the course of a hearing before a trial examiner be filed with him and authorize the examiner to grant the application.

[3] The rule is quoted in full in petitioner's appendix, p. 25.

Petitioner then requested the trial examiner to direct Geller to testify but the examiner declined to do so "because it would be in contradiction with the Board's stated policy" (R. 184a; 111a). Petitioner then moved to dismiss the complaint on the ground that it had been denied an opportunity to meet the issues presented (R. 184a; 110a-111a). The motion was denied (R. 184a; 111a). The hearing was concluded on July 7 (R. 174a). Petitioner made no attempt at any time to procure the necessary authorization for Geller to testify nor did it request Geller or the trial attorney representing the General Counsel to obtain such authorization (R. 184a).

Before the Board petitioner asserted that it was deprived of an opportunity fully to present its case because Geller refused to testify. The Board, noting the pertinent provisions of its Rule 203.90, found that petitioner was not denied due process in the presentation of its case because petitioner had made no attempt to observe the requirements of Rule 203.90. (R. 213, n. 5).

B. The Decision of the Court Below

The court below, enforcing the Board's order with certain modifications not here relevant, concluded that petitioner had failed to make a "showing of frustration by the Board or its representa-

tives as would constitute a denial of fair or full hearing" (R. 259). The court below found it unnecessary to decide whether the burden was upon petitioner or Geller to go to the Board for the authorization required by Rule 203.90 to permit Geller to testify (R. 258). It held that since petitioner itself did not take steps to procure the necessary authorization, as it might well have done, and did not afford Geller himself a reasonable opportunity to obtain that authorization, petitioner's claim that it was denied a full and fair hearing was without substance (R. 258-259).

ARGUMENT

1. Petitioner now asserts, for the first time in this proceeding (Pet. pp. 9-11), that the Board has no legal authority to adopt and promulgate Rule 203.90 of its Rules and Regulations. Petitioner did not challenge the validity of the rule before the Board.[4] Under settled principles, therefore, petitioner, having failed to urge that objection before the Board, is precluded from urging it now. Section 10 (e) of the Act; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388-389. Moreover, petitioner also failed to raise this issue in the court below. As the

[4] In its exceptions to the trial examiner's intermediate report and brief in support thereof filed with the Board, petitioner urged only, on this aspect of the case, that under the rule it was incumbent upon Geller to procure the necessary authorization to permit him to testify.

court below stated (R. 257), "It is not claimed that this regulation is on its face invalid." Certiorari will not be granted to review a question "not properly raised, litigated or passed upon below." *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328.

In any event, we submit that the rule represents a proper and valid exercise of the authority conferred upon the Board "to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act." (Section 6 of the Act). Cf. *Touhy* v. *Ragen*, 340 U.S. 462; *Boske* v. *Comingore*, 177 U.S. 459.

Petitioner's related contention (Pet. p. 20) that Rule 209.30 is invalid at least insofar as it purports to enjoin Board agents from giving oral testimony with respect to information coming to their knowledge in their official capacity, as distinguished from producing official records, documents and reports is insubstantial. The "reasons of public policy [which] may well have suggested the necessity, in the interest of the Government, of not allowing access" to documents and records in the possession of the Government, except as authorized by the proper official, and the interests of persons who have furnished the information contained in such documents or records which "would often be seriously affected if the disclosures so made were not properly guarded" (*Boske* v. *Comingore, supra*, 469-470) operate with equal force whether disclosure is sought by way of com-

pelling the production of Board records or by means of oral testimony from a Board agent.

2. Also untimely is petitioner's claim that (Pet. 11-15) even if the Board had authority to adopt Rule 203.90, the rule is vague, and should therefore be declared void, because "it does not define the scope of the privilege nor does it set forth a procedure for obtaining the consent of the Board or the General Counsel, which is demanded, in order to ascertain whether the information will be made available." This claim likewise was not raised by petitioner either before the Board or in the court below, and therefore is not properly presented now (see cases cited *supra*).

Moreover, the rule on its face is reasonably clear as to the scope of the limitation imposed upon Board employees with respect to testimony relating to matters coming to their knowledge in their official capacity. And although the rule does not set forth any specific procedure for obtaining the requisite consent for making such testimony available, the rule, as the court below noted (R. 259), readily suggests to persons of common intelligence that, as is the fact, a request for such permission addressed to the Board, its Chairman or its General Counsel would suffice.

3. Petitioner asserts (Pet. pp. 15-18) that Rule 203.90, as interpreted and applied in this case by the court below, deprived it of due process since the court below in effect and erroneously placed

upon petitioner the burden of obtaining the necessary permission for Geller's testimony. This contention misconceives the decision of the court below. In substance, the court below held (R. 258-259) that in the circumstances of the instant case it was incumbent upon petitioner at the very least to afford Geller a reasonable opportunity to seek the necessary written consent and that petitioner's failure to pursue to that end "procedural steps" which were "neither burdensome nor obscure" precluded it from claiming lack of due process. We submit that the holding of the court below is correct for the reasons stated in its opinion, and that the question resulting from petitioner's failure to seek permission to adduce Geller's testimony does not present an issue of importance warranting review by this Court.[5] There is no conflict of decisions and, on this point, none is even claimed.

Petitioner asserts, however (Pet. pp. 16, 21-26), that the court below erred in requiring it to observe Rule 203.90 in any respect because under the rule the Board's "determination of privilege is conclusive" and the Board could not lawfully suppress the testimony of one of its agents in a

---

[5] Petitioner's suggestion (Pet. p. 18) that it met the requirements of the rule when it requested the trial attorney representing the General Counsel at the hearing to permit Geller to testify ignores the fact that a subordinate of the General Counsel is manifestly not the General Counsel within the intendment of Rule 203.90. Cf. *Touhy* v. *Ragen*, supra, 462.

proceeding, such as the instant one, to which it is a party. This issue is not presented in this case. As the Board noted (R. 213a, n. 5) there is nothing to show that if permission had been sought for Geller to testify, such permission would not have been granted. And the court below expressly stated (R. 258, n. 2) that it did not "consider the possible consequences of a refusal by the Board to permit its employees to testify in a case like this." Petitioner cannot therefore be heard to say that it has been deprived by virtue of Rule 203.90 "of the means of establishing a lawful defense."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

DOMINICK L. MANOLI,
THOMAS F. MAHER,
Attorneys,

National Labor Relations Board.

MAY 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—204934/P.O.1150